THE ATTORNEY GENERAL HONG KONG

v.

LORRAIN ESME OSMAN & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING SUMMONS NO.R1-24-58 OF 1991]
12 OCTOBER 1992

EVIDENCE: Evidence gathering pursuant to application by foreign Court - Application for stay - Whether should be granted.

COURTS: Duties and powers of an examining Judge - Whether examining Judge has power to order disclosure of documents.

The first respondent applied for a stay of evidence recording on the grounds that he had been unable to make meaningful examination of the unused materials, which had been promised, and as such he was not in a position to cross-examine the witnesses if the evidence gathering were to proceed.

Held:

[1] The question of disclosure of unused materials is a matter for the Court of trial and not for the examiner in the requested state.

[2] The respondents application is premature. The proper time to make the application for disclosure is when he is tried in Hong Kong and for Counsel to put such questions before trial Court.

[3] The respondent would have no difficulty in knowing the ambit of the evidence to be adduced against him in this evidence gathering and thus prepare his defence.

[Respondent's application for stay dismissed with costs].

[Editorial Note: His Lordships March 1992 decision referred to in the judgment was reported in [1992] 2 CLJ 1282]

Cases referred to:

R v. Judith Teresa Ward ***(refd)***
Linton Berry v. The Queen [1992] 3 WLR 153 ***(refd)***

For the applicant - Clive Nicholls Q.C. (Graham Campbell Grant & Ira Biswas with him); M/s. Chooi & Company

For the first respondent - Martin Thomas Q.C. (Anad Krishnan & Renu Zechariah with him); M/s. Anad & Associates

JUDGMENT

Hj. Abu Mansor bin Ali J:

The evidence gathering in this case had earlier been 5 to 30 October 1992. On 30 September 1992 the 1st respondent, Lorrain Osman then filed a notice of motion praying for a stay of this evidence recording on the grounds given in his affidavit and another supporting affidavit. His application was opposed. The Court heard arguments from 5 October 1992 to 9 October 1992. I reserved my decision to today, Monday 12 October 1992. I now give my decision.

Mr. Thomas for Lorrain Osman began by reminding the Court that from the end of the March 1992 hearing and as a result of the letter dated 18 March 1992 it was their understanding that the 1st respondent's inspection of the unused documents, they say, as promised by the prosecution would be plain sailing and that they would be ready to cross-examine these witnesses when we resume this evidence gathering. They say since the 1st respondent has not been able to do the examination of the unused materials, which they were promised, the 1st respondent now prays for a stay of this evidence gathering.

If I understand Mr. Thomas properly, what they require the applicant, the Attorney General Hong Kong to do is to have catalogued all the unused materials to permit "meaningful inspection" as he puts it. He also wants the Attorney General to disclose all other materials which are in the hands of other third parties. Mr. Thomas cited the case of *R v. Judith Teresa Ward*, as his authority, where p. 44 of that judgment reads

> Non-disclosure is a potent source of injustice, and even with the benefit of hindsight it will often be difficult to say, whether or not, an undisclosed item of evidence might have shifted the balance, or opened up a new line of defence.

The *Ward* case, according to Mr. Thomas also helped to define the evidence to be disclosed including that of the doctors', the scientific evidence and true to say, the term unused materials are embracing.

Then Mr. Thomas took us through the voluminous correspondence between Lorrain's solicitors with the solicitors for the A.G. Hong Kong. This was with a view to show the physical constraint experienced by Lorrain's solicitors to go through the computer printouts supplied by the A.G. Hong Kong. Since inspections was a slow process because the documents were not catalogued up to 27 July 1992 Lorrain's solicitors could only inspect roughly 50% of the documents allowed. In the correspondence exchanged between the parties there was also the issue who should do the cataloguing, Lorrain saying it was the prosecution's work whereas the A.G. Hong Kong says it is for the defence to indicate to them. There was also a statement by A.G. Hong Kong that in view of the fact that Lorrain is yet to be brought to Hong Kong and charged, therefore the disclosure sought is premature. To this Mr. Thomas submitted that this evidence gathering in Malaysia is a serious exercise. Its objective is to use this evidence in Hong Kong. It may be impossible to come back and cross-examine the witnesses again at a later stage.

Mr. Thomas told the Court that by 30 May 1992, although the inspection was going on it was nothing more than indexing each file. Photocopying had hardly begun. Then by 20 July 1992 the defence had not done inspection of all documents because inspection could be done only in the morning, lack of facilities and the documents were not properly catalogued. In reply that the application for disclosure is sham, Mr. Thomas submitted that the defence request must be seen as that the defence had requested disclosure as far back as 1988.

As an example Mr. Thomas also spoke of the *West LB* case postponement. It was necessary to have it adjourned for evidence taking abroad because disclosure did not take place at an earlier stage.

There was also another reason given by Mr. Thomas why this evidence gathering should be stayed, since those representing Mr. George Tan who is to be charged with Mr. Lorrain Osman will not be able to cross-examine the witnesses to be called and they would be reserving their cross-examination of the witnesses. Lorrain's Counsel may find it necessary to apply for further cross-examination of these witnesses to be called depending on what the witnesses will throw out when they are finally cross-examined by George Tan's representative.

With all these factors in mind Mr. Thomas submitted that Lorrain's Counsel are not in a position to carry out any meaningful cross-examination of all witnesses to be called. For the above reasons he applies that this evidence gathering be stayed.

It may be necessary to remind myself that this evidence gathering is as a result of a request by the Hong Kong Court, to record evidence of witnesses to be called here. In the limited way given we have to exercise that power in accordance with judicial principles. In my judgment in March 1992 at p. 7 I wrote:

> In an examination of O. 39 and the above mentioned relevant rules it is beyond dispute that the examining Judge has no power to rule on the admissibility or materiality of the evidence adduced before him. That is the function of the foreign trial Judge.

Then I went on to consider the unused materials when my directions was sought in this matter.

> As has been stated by Mr. Thomas there is progress and he produced before us the latest letter from Mr. Clifford Chance dated 18 March 1992 (P14) giving access to all unused materials and the way how inspection and copies are to be made. I have no doubt that problem will solve themselves.

I was then being factual as to the state of things then.

From then there was indeed disclosure but in order to facilitate the defence examination Mr. Thomas says the prosecution must catalogue the unused materials. The defence also wants to be disclosed the unused materials that the prosecution claims are in the possession of third parties such as the bankers and other agencies.

I have anxiously considered Mr. Thomas's lengthy submission and also the submission of Mr. Nicholls for Hong Kong A.G. Mr. Thomas says what the defence applies for is Lorrain's right to fairness. I must emphasize that fairness must be to both parties and I must not forget what is the rule here, applicable, in this particular case.

What is the rule? I find merit in the submission of the applicant, the Attorney General Hong Kong that the disclosure of unused material is a matter for the Court of trial that is Hong Kong Court and not for the examiner in the requested state Malaysia. This is consistent with what I had held in March 1992 when I held it is beyond dispute that the examining Judge has no power to rule on the admissibility or materiality of the evidence adduced before him.

I also uphold the applicant's submission that disclosure is an on-going process. In the case of *Linton Berry v. The Queen* [l992] 3 WLR 153 the defence objection was correctly taken, when the evidence was being led by the prosecution, it would be for the learned trial Judge to decide on the relevancy or materiality of undisclosed material. In view of this decision, I also uphold the submission of the applicant, the Attorney-General that this application of Lorrain herein is premature and I rule the proper time to make the application for disclosure is when he is tried in Hong Kong and for Counsel to put such question before the trial Court.

As to the question being raised by Mr. Thomas that the defence is unable to conduct meaningful cross-examinations of the witnesses to be called, I will again apply what I said in my March 1992 judgment that this exercise cannot be taken in isolation. With all due respect to Mr. Thomas and those assisting him the defence will be able to conduct a proper cross-examination of the witnesses to be called. In p. 11 of my March 1992 judgment I wrote:

> ... the evidence in the extradition proceedings in London were examined in the "microscopic details" involving 30,000 pages of documents in a hearing time frame of 66 days, 19 days of which were spent on arguments... I do not entertain the slightest doubt in my mind and it must be true that, as described by His Lordship in the Divisional Court, Lorrain and their advisers must know the ambit of the charges.

Since then Lorrain had gone through his eighth *habeas corpus* application, I say again here, I have no hesitation, after having been led by both sides, through the correspondence between parties, in the course of argument, in this application that Lorrain would have no difficulty in knowing the ambit of the evidence to be adduced against him in this evidence gathering and thus prepare his defence. That being my decision, I reject Mr. Thomas's application for a stay and order that this evidence gathering commences on Tuesday the 13 October 1992 at 9.30 a.m., with cost of this application to be borne by Lorrain Osman to be taxed.